

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

OLIVER KIMMONS,

Defendant.

16-CR-63
DECISION AND ORDER

The defendant, Oliver Kimmons, was indicted on May 31, 2016, for possession with intent to distribute fentanyl (Count 1); possession with intent to distribute heroin (Count 2); possession with intent to distribute cocaine (Count 3); maintaining a drug-involved premises (Counts 4 and 6); and possession with intent to distribute and distribution of fentanyl (Count 5). Docket Item 11. On September 1, 2016, Kimmons filed an omnibus discovery motion, a request for a *Franks* hearing, a motion to suppress evidence, and a motion to dismiss the indictment for outrageous government conduct. Docket Item 25. The government responded on September 16 and 21, 2016. Docket Items 27 and 28. Oral argument was scheduled for October 5, 2016; because Kimmons's attorney died unexpectedly, however, a status conference was held on September 26, 2016, and a new attorney was assigned to represent Kimmons. See Minute Entry for September 26, 2016.

After “the defendant requested and consented to multiple adjournments in order to determine whether additional charges would be filed against him,” see Docket Item 41 at 4, a superseding indictment was returned on March 21, 2017, adding seven additional counts. Docket Item 37. Specifically, the superseding indictment added one count of conspiracy to distribute heroin and fentanyl; one count of possession with intent to distribute heroin and fentanyl; and five counts of sex trafficking by force, fraud, or coercion. *Id.* Kimmons was arraigned on the superseding indictment on March 23, 2017, and a deadline of April 28, 2017, was set for filing pretrial motions. Docket Item 38. On May 1, 2017, Kimmons filed an omnibus discovery motion, motions to suppress evidence and to dismiss the indictment, and a motion to sever the drug counts from the sex-trafficking counts¹. Docket Items 41 and 42. In these motions, Kimmons explicitly adopted the motions filed by his prior counsel. The government responded to Kimmons’s motions on May 15, 2017, Docket items 45 and 46, and Magistrate Judge H. Kenneth Schroeder, Jr., heard oral argument on May 25, 2017. See Minute Entry for May 25, 2017.

¹ A decision on Kimmons’s motion to sever counts will be the subject of a separate Decision and Order.

Judge Schroeder issued a sealed Report, Recommendation and Order (First RR&O) on January 10, 2018, denying Kimmons's request for a *Franks* hearing, and recommending the denial of Kimmons's motion to suppress evidence and to dismiss the superseding indictment. Docket Item 54. At the defendant's request, the deadline for filing objections was extended twice to April 13, 2018. See Docket Items 57 and 59. Then, after the grand jury returned a second superseding indictment on April 12, 2018, Docket Item 62, this Court again extended Kimmons's time to file objections to the RR&O to April 23, 2018. But no objections were ever filed to the First RR&O.

On April 30, 2018, Kimmons was arraigned on the second superseding indictment, see Minute Entry for April 30, 2018, which added a count of distribution of fentanyl causing death.² On July 9, 2018, Kimmons moved to adopt all his previously filed motions and to dismiss the newly added count of distribution of fentanyl causing death. Docket Item 69. The government responded on July 27, 2018. Docket Item 70. Judge Schroeder heard oral argument on August 8, 2018, and he issued a second Report, Recommendation and Order on November 5, 2018 (Second RR&O), recommending the denial of Kimmons's motion to dismiss. Docket Item 75.

Kimmons did not object to either the First RR&O or the Second RR&O, and the time to object has now expired. For that reason, the defendant has waived his right to

² The second superseding indictment charges Kimmons with conspiracy to possess with the intent to distribute, and conspiracy to distribute, heroin and fentanyl, in violation of 21 U.S.C. § 846 (Count 1); possession with intent to distribute heroin and fentanyl (Count 2); distribution of fentanyl causing death (Count 3); possession with intent to distribute fentanyl (Count 4); possession with intent to distribute heroin (Count 5); possession with intent to distribute cocaine (Count 6); maintaining a drug-involved premises (Count 7); possession with intent to distribute and distribution of fentanyl (Count 8); maintaining another drug-involved premises (Count 9); and sex trafficking by force fraud or coercion (Counts 10-14). See Docket Item 62.

have the RR&Os reviewed. See Fed. R. Crim. P. 59(b)(2) (“Failure to object in accordance with this rule waives a party’s right to review.”); see *also* Docket Item 54 at 15 and Docket Item 75 at 6.

Nevertheless, in its discretion, this Court has carefully reviewed the First RR&O, the Second RR&O, and the parties’ submissions to Judge Schroeder in connection with the motions addressed in both RR&Os. Based on that review and the absence of any objection, and for the reasons stated in the First RR&O and the Second RR&O, this Court adopts the First RR&O and the Second RR&O in their entirety. Kimmons’s motions to suppress evidence, to dismiss the indictment and the superseding indictment, and to dismiss Count 3 of the second superseding indictment are DENIED.

SO ORDERED.

Dated: November 28, 2018
Buffalo, New York

s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE